Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

ROUTE 17 CORPORATION, a Delaware Corporation registered to do business at Route 17, and Wellsburg Crossover, Ashland New York,

Petitioner,

vs.

TOWN OF ASHLAND, SHELDON ROBINSON, EDWARD BLY, EARL L. STATON, ANDREW J. GOTHAM, WALTER JILSON, GARY L. PATELUNAS, Individually and as Code Enforcement Officer, and JOSEPH J. BALOK, JR.,

Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

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96 pp

QUESTIONS PRESENTED FOR REVIEW

1. Has this Court, under its decisions in Young v. American Mini-Theaters, 427 U.S. 71; Schad v. Borough of Mt. Ephriam, 452 U.S. 61; and Renton v. Playtime Theaters, 475 U.S. 41 permitted a community to constitutionally single out protected press expression, and utilizing a criminal law, to regulate the location where, and the ratio of quantities of, publications having defined sexual content, allowed to lawfully be kept as stock-in-trade observable for patrons without affirmative evidence from contemporary studies showing that such printed materials with such content observable by patrons in purchasing selection conduct alone, creates harmful or undesirable secondary effects upon the surrounding community?

2. Is this Local Law of Ashland, New York a facially invalid content based criminal law, under the First and Fourteenth Amendments, because it bases its penal prohibitions and punishments against press dissemination conduct only upon the content of stocked press publications when constituting substantial or significant stock for patron observation of the press works?

3. Did the Circuit Court err in finding that Route 17 Corp. waived its claim, that the loose paper factual evidence exhibits were improperly submitted to the trial count ex parte, under F.R.C.P. 56 (e) without being attached to the affidavit or served therewith, on the basis it did not present such claim when the materials were submitted to the Court, since the facts and documents show Route 17 Corp. was unaware of their improper

ex parte delivery to chambers and therefore could not object to consideration of them, as the lack of presentation of such documents was even made the basis of counsel argument in open court, and neither Respondents' counsel or the Court disputed Petitioners argument of such or in any way referred Petitioner to the previously delivered papers?

LIST OF PARTIES TO THE PROCEEDINGS UNDER RULE 14.1(b) and entities UNDER RULE 29.1

All parties to the proceeding below in the United States Court of Appeals for the Second Circuit, whose judgment is sought to be reviewed, as well as in the District Court appear in the caption of the case and are the only interested parties.

Petitioner, Route 17 Corporation, is a private corporation which is incorporated under the laws of Delaware and is authorized to, and does, conduct its business in the State of New York. Route 17 Corporation has no publicly traded stocks, nor parent, subsidiary or affiliate corporations to list pursuant to Rule 29.1.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPINIONS AND JUDGMENTS BELOW

The opinion, and order of the United States Court of Appeals for the Second Circuit affirming the District Court decision is not reported and is reproduced in the Appendix at pp. a1. However, the unpublished opinion is

noted in 50 F.3d. 3 Tables. The Court of Appeals unreported order denying rehearing and rehearing in banc is set forth in the Appendix.

The District Court's opinion and order denying Petitioner's motion for summary judgment and granting Respondents' request to dismiss is similarly unreported and is reproduced in the Appendix. The District Court's post-decision order respecting documents for inclusion in the record on appeal is also reproduced in the Appendix.

STATEMENT OF JURISDICTIONAL GROUNDS

Route 17 Corporation operated the only book and video store in the town of Ashland, New York. It ceased business activity when served with a "cease and desist order" issued by the town and thereafter filed its federal civil rights complaint for Declaratory and Injunctive Relief, damages, costs, and counsel fees.

Jurisdiction in the District Court was founded upon 42, U.S.C., Sect. 1983 and 1988 as well as 28, U.S.C., Section 1343 (a) (3) and (4) and under 28, U.S.C., Sect. 1331 with respect to these civil rights claims. Jurisdiction to render declaratory and injunctive relief also arose under 28, U.S.C., Sect. 2201 and 2202 as well as F.R.C.P. 57 and 65.

Jurisdiction in the Court of Appeals is provided under 28, U.S.C., Sect. 1291 as the judgment was final under F.R.C.P. 54 (b) and 58.

The jurisdiction of this Court is invoked under 28, U.S.C., Sect. 1254 (1) and Supreme Court Rule 13. The issues were presented to the District Court by Petitioner's Motion for Summary Judgment and Permanent Injunction and by the Respondents' request for dismissal. Corporation's motion and granted the Town parties' Motion to Dismiss. The District

Court order dismissing all of the Store's claims and disposing of the Complaint and the claims of all parties was final.

The unreported memorandum opinion and order of the Court of Appeals, affirming the District Court, was entered on February 15, 1995. A timely petition for rehearing, with a suggestion that the appeal be re-heard in banc was filed. This petition for rehearing was denied on April 21, 1995. Mandate issued April 28, 1998. Thus the decision was final.

CONSTITUTIONAL RULE AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the First and Fourteenth Amendments, the Ashland comprehensive zoning ordinance, and Local Law No. 1 for 1990 of the Town of Ashland, New York are reproduced in the appendix to this Petition.

STATEMENT OF THE CASE

Route 17 Corporation agreed to a lease

for a commercial zoned building from T and R Realty Corp. in the Town of Ashland, New York, subject to being put into lease form, which lease was thereafter executed June 5, 1991. It commenced doing business on October 28, 1991.

Route 17 opened a retail outlet in which it displayed to patrons for off premises sale and consumption expression materials including hundreds of publications, books, novels, magazines, newspapers, and videotape film, as well as other items. In addition, Route 17 provided on premises video viewing booths. A portion of this expression print product is reasonably classified as sexually oriented in nature and may contain depictions or written descriptions and matters relating to sexual activity or anatomical areas as set out in Article 1 of Local Law No. 1 of Town of Ashland. Additionally it provides on-site video tape motion picture viewing facilities

and equipment which permit patrons to personally select the desired film for viewing and for that patron to operate the supplied integrated equipment to enable customer viewing in a booth of those patron selected exhibited motion picture films. Display of publications to patrons is provided to enhance selection for purchase and removal. The video viewing booth exhibitions, and the display for observation of videotapes and the sale of publications and videotapes are unregulated by this law. Thus Petitioner is permitted to stock, possess and sell publications so long as it does not permit them to be observed by its patrons in the premises in their selection process prior to off premises sales. Thus it is a restriction on pre-sale selection of all publications on the premises.

The Town of Ashland, as a result of alleged rumors of an adult bookstore locating at the property, then commenced to conduct

meetings seeking ways to take action against allowing the completion and opening of that type establishment which in December, 1990 resulted in the Town enacting Local Law No. 1 of 1990.

On October 31, 1991 three days after store opening Patelunas, personally appeared at the bookstore premises and purchased a selected few of the speech and press and videotape items from the store and, upon paying for the same, delivered and served the previously prepared "Cease and Desist Order" issued and signed by him ostensibly in the capacity of Town of Ashland Code Enforcement Officer.

The bookstore on November 7, 1991 complied with that Order and ceased all business activity and closed its premises eleven (11) days after opening.

The Town of Ashland under New York Town Law enabling statutes in 1963 had adopted its

Comprehensive Zoning Plan and Town Zoning Map as required for zoning enactments and established six zoning districts and specified the permitted uses therein with administrative procedures.

The process of enacting this separate non-zoning local law, however, had its Genesis in the introduction of and approval of Resolution No. 5 on May 7, 1990 by the Town Board of the Town of Ashland which imposed a 'moratorium" for the purpose of prohibiting anyone from operating any "adult book stores" or any other business restricted to just adults until 9/30/90. In the following months the issue as to adult bookstores in accord with state and town law was forwarded to the Town Planning Board for initial consideration. The Town planners subsequently proposed the existing Town Board adopt a zoning ordinance amendment to the existing Town Comprehensive Zoning Plan, map, and laws as prepared by them

to create a new "Industrial Zone" which would be located in the western extremity of the Town and also to amend the existing zoning map and thereby limit "adult uses" establishments to this new industrial zone.

The Town of Ashland Town Board on October 19, 1990 published its public notice of the hearing on that proposed zoning amendment from the Planning Board for October 24, 1970. However, at the 10/24/90 Town Board meeting upon motion, after the hearing on the proposed zoning amendment ordinance, the entire matter and proposed zoning ordinance and map amendment issue was "tabled". On December 12, 1990 the Town Board at this later meeting conducted a public discussion by Balok as to what could be done with "Adult Book Stores". A resolution No. 1 was made to adopt a Local Law to be designated as No. 5 of 1990 concerning "Adult Book Stores" with criminal provisions which was then adopted. It

prohibited the future establishment of a bookstore, in which publications were to be observed by patrons, when the store is within certain distances of other uses and buildings. It made no reference to any land use zoning class.

The ordinance in Article I, made it unlawful "to hereafter establish" such a store with such quantity of press materials for patrons to observe within certain distances of other premises. Article II, defined the term "obscene" and made it a crime to promote obscene material. That Article is not at issue. Article III defined the terms "harmful to Minors" and sexual conduct which that Article made it illegal to promote such materials to minors. That Article similarly is not at issue here.

Route 17 Corporation filed the instant action in the Western District of New York challenging the constitutionality of Local Law

No. 1 of 1991 of the Town of Ashland, New York.

Following discovery, the bookstore filed its Motion for Summary Judgment and Injunctive Relief with Affidavit and attached and incorporated Exhibits. The Town Defendants filed their affidavit and attached exhibits in opposition and requested the Court to deny the Summary Judgment sought by the bookstore and dismiss the Complaint.

The Trial Court conducted a hearing in Court for argument on those issues on March 17, 1994. During the argument proceeding Petitioner's counsel stated on the record that the Defendants had failed to produce such alleged prior studies supposedly relied upon and that it was their duty to do so but had not produced them in Court and summary judgment was proper. Neither the Court or defense counsel denied the failure to produce evidence of such studies or disclosed that

defense counsel had previously delivered such paper documents to chambers ex parte. Judge Larimer rendered his memorandum opinion and judgment on June 13, 1994 denying the Motion for Summary Judgment and holding the ordinance constitutional and granting the Town Defendants request for dismissal of all claims. A timely notice of appeal was filed to the Court of Appeals for the Second Circuit.

That appeal brought those issues, the correctness of the Trial Court's ruling, and the validity and propriety of review and consideration by the Trial Judge of certain papers submitted directly by the Town's attorney to the Trial Court without attachment to or incorporation in the motion affidavit of defense counsel under Rule 56 (e) and without compliance with Rules 10 and 11 of FRCP and also without service of them or even a certificate of service, under Rule 5, upon

counsel for the bookstore and thus denying the opportunity for Appellant to timely object or oppose their content.

The Circuit Court affirmed the District Court's decision, and rejected all issues presented, including the wrongful prejudicial ex parte delivery without service, of the loose papers containing other cities studies, to chambers by finding a waiver for failure to object to the trial Court's consideration of them even though Petitioner's counsel lacked knowledge of their delivery and had even challenged the lack of them subsequently in open Court during oral argument on the summary judgment motion and response without correction or objection by opposing counsel or the Court.

ARGUMENT

I.

THIS LOCAL LAW IS INVALIDLY ENACTED BOTH PROCEDURALLY AND UNDER NEW YORK STATE LAW WITHOUT FACTUAL SUPPORT OF

RELEVANT STUDIES OF SECONDARY EFFECTS

The New York Constitution, Art. 1x, Local Governments, Sect. 1 (a) provides the Town of Ashland with the power to adopt local laws. Under Chapter 36-a of the New York Consolidated Laws, Sect. 10 the Town of Ashland is statutorily given the power to enact and amend laws that are not inconsistent with general state law. Town Law Sect. 263 compels the enactment of zoning laws in accordance with a "comprehensive plan". The Court of Appeals held that the issue raised on appeal concerning the evidence and procedure factually supporting its enactment and failure to following state land use zoning law thereby creating a facially invalid prior restraint of speech was a state law claim that the law was illegally adopted and not raised before the District Court. The Court of Appeals thus refused to pass on the issued intended and

believed to be properly raised and decided citing Singleton v. Wulff, 428 U.S. 106, 120. This was incorrect but it was possibly due to Petitioner's questions presented No. 2 being unartfully drawn coupled with the Court's wrongful waiver determination of Rule 56 (e) violations. However, the issue was whether their local law was facially invalid and not a proper land use law with prior factual support.

At least as crucial here is the failure of this Local law, under Town Law, Sect. 263, to be enacted with adequate factual support of harmful effects in accordance with such a "comprehensive plan". Udell v. Haas, 21 N.Y. 2d 463, 288 N.Y.S. 2d 888, 235 N.E. 2d 897, Carlton Tennes Assoc. Inc. v. Town of Clay, 131 Misc. 2d 522, 500 N.Y.S. 2d 908. That is also the issue presented below. It is clear that it was not enacted in accordance with the comprehensive plan.

This legislatiYon then is not enacted to alleviate harmful secondary effects from such businesses in furtherance of protecting the Town's morals, health or safety from business dispensing such materials by applying it only to a business having printed press publication but not the other disseminators of similar materials which renders the law a discriminatory enactment.

Where the Town statutory classification approaches sensitive and fundamental personal rights, the classification must be closely scrutinized in light of its asserted purposes and shown to be no greater than is necessary to alleviate those evils; it is the Town which bears the heavy burden of justifying its classification by demonstrating that it is necessary to promote a substantial governmental interest. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Harper

v. Virginia State Bd. of Elections, 383 U.S. 663 (1966). In addition, the State must survive an examination of the means it chose to determine whether there exists any less discriminatory alternative to achieve its asserted interest. Attorney Gen. v. Soto-Lopez, 476 U.S. 898, 909-910 (1986) (plurality); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974); Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Shapiro v. Thompson, 394 U.S. 618, 637 (1969).

II.

THE RESPONDENTS HAD THE BURDEN OF PROOF BUT FAILED TO ESTABLISH THE CONSTITUTIONALITY OF THE PROVISIONS OF THIS LOCAL LAW WHICH SELECTIVELY INFRINGES ON THE EXERCISE OF PRINTED SPEECH AND PRESS RIGHTS

Contrary to the normal rule, the Town must bear the burden of establishing the constitutionality of any law regulating the exercise of First Amendment rights. See Schad v. Borough of Mt. Ephriam, 452 U.S. 61. The Tenth Circuit in Association of Community

Organizations for Reform Now (ACORN) v. Municipality of Golden, 744 F.2d 739, 746 (10th Cir. 1984) in accord with this Court and other circuits stated this principle:

> [T]hough duly enacted laws are ordinarily presumed constitutional, when a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality. E.G., ACORN v. City of Frontenac, 714 F.2d 813, 817 (8th Cir. 1983); Rosen v. Port of Portland, 641 F.2d 1243; 1246 (9th Cir. 1981) (such laws are presumptively unconstitutional and state bears burden of justification); Espinosa v. Rusk, 634 F.2d 477, 482 (10th Cir. 1980) (regulations which restrict exercise of First Amendment rights by requiring prior approval are suspect and face on unfavorable presumption of invalidity), summarily aff'd 456 U.S. 951, 102 S. Ct. 2025, 72 L. Ed. 2d 477 (1082). (Emphasis added) 744 F.2d 739, 746.

See also Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 29 L.Ed. 2d 1, 91 S. Ct. 1575, 1577 (1971); New Jersey Citizen Action v. Edison Township, 797 F.2d 1250, 1255 (3rd Cir. 1986); City of Watseka v. Illinois Public Action Coalition, 796 F.2d 1547 (7th Cir. 1986), Aff'd _____ U.S. _____ (1/20/87);

Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 248, 252 (7th Cir. 1985);

The Town Board had no competent supporting evidence given to it to support this enactment. This Court in Schad v. Borough of Mt. Ephriam, 452 US 61, 101 S. Ct. 2176 found that Young v. American Mini Theaters, 427 US at 71, 96 S. Ct. at 2452 also required zoning ordinances affecting only adult theaters be "justified" by the city, that is, such articulated reasons must be factually justified for a Town to reasonably rely upon for its speech restrictive enactment. The Mt. Ephriam court required a "sufficiently substantial government interest" be shown when a broad category of protected expression was involved.

Turning to the laws provisions itself it is readily apparent that this is simply a content based penal statute with three separate criminal prohibition subjects in it.

Beyond criminalizing obscenity and barring the dispensing of only harmful materials to minors there is no justification for restricting targeted book sale displays separate from their sales or film and video and film exhibition activity as constituting quantities of stock-in-trade and allowing all other adult material and all adult businesses.

III.

THE LOCAL LAW CANNOT BE SHOWN TO HAVE BEEN ENACTED ON THE BASIS AND STUDIES IN THE ISLIP CITY ENACTMENT OR SURVEYS

The Town in its defense below sought to support and base its enactment upon studies from the Town of Islip (see Islip v. Caviglia, 73 NY 2d 544, affirming 141 Ad2d 148) and results of alleged survey forms in the Village of Wellsburg.

Leaving to the side the fact that the survey documents were improperly submitted and thus improperly considered below the alleged survey itself is patently invalid and can

support no findings and relevance. In fact, the Town's "Statement of Uncontroverted Facts" submitted at hearing does not set out any factual allegations that such evidence was submitted to or considered by the Town Board.

The alleged survey forms were claimed to be ones used by the Village of Wellsburg (a small incorporated Community in the Town's boundaries) which was supposedly conducting a study whether adult bookstores should be regulated by that Village, Even a cursory viewing of them show that there are numerous reasons why they cannot be considered, (1) they are undated; (2) only personal beliefs are sought; (3) no limiting as to age, voter, actual residents, or property owner; (4) how many residents are there and how many distributed and how many responses; (5) actual residence verification ignored; (6) they were given right to omit their name and addresses in responding and many were left anonymous;

(7) not listed who caused their distribution; (8) who they were sent to; (9) what their beliefs were factually founded upon or (10) length of time of residence. There was no evidence that the Town Board saw them, considered them or even knew of them. Finally no mention of them by the Town Board exists even in the minutes of the meetings and what the survey results would mean with regard to Ashland laws.

The Town of Islip alleged studies also are not applicable here. Islip studied, by individual site analysis, all adult businesses as well as review of studies and ordinances of other jurisdictions utilizing laws to regulate all adult businesses.

Taking the sworn testimony of Balok, Patelunas and Doland, the Town Board Secretary, at the adversarial live depositions submitted by Petitioner to the Court as motion exhibits prior to their later reflection and

submission in their responding affidavits, attempting to explain their prior adversarial testimony under oath, they readily admitted they had no such studies and results to produce and that the Town Board never saw such studies or survey when this law was considered.

IV.

THIS LOCAL LAW IS INVALID ON ITS FACE AND AS APPLIED BECAUSE IT IMPOSES A CONSTITUTIONALLY PROHIBITED PRIOR RESTRAINT AND BURDEN ON PETITIONER AND PRINTED SPEECH BASED UPON CONTENT AND IS NOT A REASONABLE GENERAL TIME, PLACE AND MANNER RESTRICTION

This Local law is not supported by any articulated and factually supported substantial governmental interest and under the facts its restrictions has not been shown to further any appropriate articulated secondary effects elimination or substantial government interest. Similarly it is not narrowly tailored nor directed to achieve any stated goal unrelated to speech content

suppression. Finally the restrictions it imposes are substantially greater than reasonably necessary to the furtherance of all alleged interest.

It is fundamental precept of the First Amendment to the United States Constitution that all expression, whether it is written, pictorial or by way of performance, is presumptively protected against government interference and restraint. In this case, there is no contention or issue that minors are allowed on the plaintiffs' business premises or that any material sold or exhibited violated the obscenity laws.

Therefore, the kinds of expression occurring at the plaintiffs' places of business are presumptively protected by the First Amendment to the Constitution of the United States.

In considering legislation, in the form of prior restraints against classes of speech

and speech activities, this Court has stated that when challenges are raised on the ground that the legislation affects First Amendment rights:

> the standard of review is determined by the nature of the right assertedly threatened or violated rather than the power being exercised or the specific limitations being imposed. Thomas v. Collins, 323 U.S. 516, 529-530 (1945).

Schad, supra at 60.

Due to the First Amendment's paramount position among all constitutional rights due process, under the Fourteenth Amendment to the United States Constitution, requires that all laws which seek to regulate First Amendment activities must be sufficiently definite and certain so as not to be impermissibly vague. In ordinary land use regulations their validity is largely dictated by the decisions in Young v. American Mini Theaters, Inc., 427 US 50, Renton v. Playtime Theaters, 475 US 41 and Schad v. Borough of Mt. Ephriam, 452 US

61. The regulating authority is not favored, in the analysis, with any presumption of validity of its restriction of First Amendment rights. Schad v. Borough of Mt. Ephriam, 452 US 61, 77 (1981) (presumption of validity carries little, if any, weight where regulation infringes on rights of expression protected under First Amendment); Thomas v. Collins, 323 US 516, 630 (1945); reh. den. 323 US 819 (1945) (usual presumptions supporting legislation balanced by referred place given to freedom secured by First Amendment).

Accordingly, the State may not simply rely upon a statement of legislative purpose. Instead, the State must be prepared to "... articulate, and support, a reasoned and significant basis for its decision" to regulate. Schad v. Borough of Mt. Ephraim, 452 US 61, 77 (1981). And see, Schneider v. State, Los Angeles v. Preferred Communications, 476 US 488, 496; Bridges v.

California, 314 US 252 (1941)

Crucial, then, to the Supreme Court's holding in both Younger and City of Renton was the determination that the ordinance under scrutiny was supported by an adequate "factual basis." On the other hand, where adult land use and content-specific regulations restrict the exercise of free speech rights and where the regulating authority has failed to demonstrate that its enactment is supported by such a factual basis, the courts have unhesitatingly invalidated the regulation. Schad v. Borough of Mt. Ephraim, 452 US 61.

In his concurrence in Young v. American Mini Theaters, Justice Powell wrote that a zoning scheme such as Detroit's, in order to survive constitutional scrutiny, must satisfy the test set forth in United States v. O"Brien, 391 US 367 (1968): (1) whether the enactment is within the constitutional power of the government; (2) whether it furthers a

substantial governmental interest; (3) whether that interest is unrelated to the suppression of free expression; and (4) whether the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. Convinced the Detroit plant met all parts of the test, Justice Powell joined the plurality in upholding the plan. He cautioned, however:

> ... Although courts must be alert to the possibility of direct rather than incidental effect of zoning on expression, and especially to the possibility of using the power to zone as a pretext for suppressing expression, it is clear that this is not such a case. 427 US 50, 84.

In the wake of American Mini Theaters, local governments around the country experimented with zoning as a way to regulate (and in many cases, eliminate or ban) adult businesses. Many of these schemes failed to consider the caveat in American Mini Theaters: the legality of the Detroit scheme "... would

be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." Id. at 71, n.35.

Although this Court modified the requirement somewhat as to what studies and factual foundation a restrictive zoning ordinance could be based upon. That modification only dealt with the permission to use the valid results of studies and findings of other cities. It did not modify the quantum nor the burden of actual legislative review and adoption of such proper government studies and to tailor their enactment in accordance with constitutional parameters.

At the outset, the Renton Court stated:

> "This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. On the other hand, so-called "content-neutral" time, place, and manner regulations are acceptable so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communications."

(Citations omitted.) Renton, 475 US at 46-47. The "substantial governmental interest" shown in Renton was that of combatting the undesirable secondary effects of adult theaters. In a statement crucial to this case, the Renton Court noted:

> "[T]he Renton ordinance is 'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in Schad v. Mount Ephraim, 452 US 61[, 68 L.Ed. 2d 671, 101 S.Ct. 2176] (1981), and Erznoznik v. City of Jacksonville, 422 US 205[, 45 L.Ed.2d 125, 95 S.Ct. 2268] (1975)."
>
> Renton, 475 US at 52, 106 S.Ct. at 931.

In contrast, the Town of Ashland here has not shown that adult businesses with predominantly "take home" printed books, magazines and other periodicals (which clearly are covered by the ordinance) have the same harmful secondary effects traditionally associated with adult movie theaters and peep shows; thus the "substantial governmental

interest" portion of the test has not been met.

In addition to the fatal defects discussed above the local law suffers from an even greater defect that of narrow tailoring and overbreadth which fails to allow for reasonable alternative means of dissemination. That is, there are not only inadequate alternative sites and avenues for dissemination of these printed materials but as shown by the affidavit and the land survey engineers and mapping there are no available alternative sites at which to locate. Renton, 475 US 41, 106 S. Ct. 925, 930. This law even requires a distance of 500 feet from the property line of a single rooming unit which alleviated hotels, motels, apartments over business and also as applicable here caretakers living quarters.

V.

PETITIONER DID NOT KNOW ABOUT

AND COULD NOT WAIVE WRONGFUL
SUBMISSION OF PAPERS COURT RULED OPINION

Route 17 Corporation designated and submitted all of its exhibits for trial court consideration attached to and incorporated into its affidavit supporting its motion for summary judgment. Counsel for the Defendants did likewise. However, the subsequent delivery of the documents by counsel for the town constituting supposed Village surveys and including miscellaneous papers, held together by a rubber band, were not attached to nor incorporated into Defendants affidavit. In fact, that affidavit stated that they "will be handed up to the Court." This is a statement of future intended conduct not a present act at all. They nothing more than unsubstantiated papers unserved upon the store's counsel and were invalid for consideration under Rule 56, F.R.C.P. by the Trial Court. They were invalid in form

containing no title page, docket number, case titling, certificate of service or signature and should not have been considered as they were not served upon counsel nor filed with the Clerk but simply delivered to chambers. De Cinto v. Westchester County Med. Cntr., 821 F2d 111, (CA2, 1987) cert. den. 484US965.

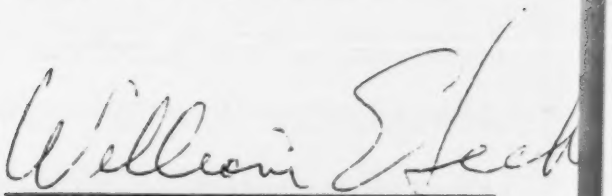
The Trial Court as shown by its post hearing opinion and judgment reviewed and improperly considered these papers and in its ruling. For this reason, the decision should be reversed also.

CONCLUSION

Based upon the foregoing arguments and authorities, as well as the importance of the constitutional issue raised in the Petition, Petitioner respectfully requests this Honorable Court to grant the Writ and either reverse the judgment and order of the Court of Appeals and declare the Ashland Town Local Law unconstitutional, or order briefing and

hearing on the merits.

Respectfully submitted,



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